Supreme Court, U.S.
FILED

(1)

98 1476 MAR 16 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DAVID LATIFF,

Petitioner,

vs.

ELMINI LYMPH, INC., CERES HELLENIC ENTERPRISES, LTD. and THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

RICHARD J. DODSON,
Bar Roll No. 4982
Counsel of Record
DODSON & VIDRINE
A Professional Law Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-0633
Counsel for David Latiff

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

64PP

QUESTION PRESENTED

I. Are punitive damages available to an injured Jones Act Seaman where the employer/shipowner intentionally, arbitrarily, capriciously, and callously denied maintenance and cure under the General Maritime Law?

LIST OF PARTIES

The parties to the action are David Latiff, Elmini Lymph, Inc., Ceres Hellenic Enterprises, Ltd. and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF CASE 2

ARGUMENT 4

I. The Louisiana Supreme Court Erred in refusing to grant writs to the Louisiana First Circuit Court of Appeal for reversing the trial court's award of punitive damages to an injured seaman who was intentionally, arbitrarily, capriciously, and callously denied maintenance and cure by the vessel owner 4

CONCLUSION 18

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Standard Oil Company, 318 U.S. 724 (1943) 5

Baltimore SS Company v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) 16

Chamberlain v. Chandler, 5 F.Cas. 413 (C.C.D. Mass. 1823) (No. 2,575) 13

City of Carlisle, 39 F. 807 (D. Or. 1889) 13

Cox v. Roth, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955) 15

Day v. Woodworth, 54 U.S. 363 (1851) 12

Duplantis v. Texaco, Inc., et al., 771 F. Supp. 787 (E.D.La. 1991) 13

Ellender v. Texaco, Inc., 640 So.2d 845 (1st Cir. 1994) 13

The Elzina Lines, 102 F. 184 (C.C.D. Mass. 1900), *rev'd on other grounds*, 199 U.S. 119 (1905) 14

Evich v. Morris, 819 F.2d 256 (9th Cir. 1987) 18

Gallagher v. The Yankee, 9 F.Cas. 1091 (N. Dist. of Ca.) (No. 5,196), *affirmed*, 30 F.Cas. 781 (C.N.D. Ca. 1859) (No. 18,124) 13

Garrett v. Moore-McCormack Company, 63 S.Ct. 246, 317 U.S. 239, 87 L.Ed. 239 (1942) 16

The General Rucker, 35 F. 152 (W.D. of Tenn. 1888) 14

Gould v. Christianson, 10 F.Cas. 857 (So. Dist. N.Y. 1936) (No. 5,636) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046, 116 S.Ct. 706, 133 L.Ed.2d 622 (1996)... 3, 4, 9, 10, 16, 18

Guttner v. Pacific Steam Whaling Co., 96 F. 617 (N.D. Cal. 1899) 14

Harden v. Gordon, 11 F.Cas. 480 (D. Maine 1823) (No. 6,047) 5, 6

The Harriet Newhall, 11 F.Cas. 598 (D. Mass. 1856) (No. 6,102) 14

Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996) 6

Hudson v. Jordan, 12 F.Cas. 1089 (D.Me. 1837) (No. 6,959) 13

Jay v. Almay, 13 F.Cas. 387 (C.C.D. Mass. 1846) (No. 7,236) 13

The Lively, 15 F.Cas. 1631 (C.C.D. 1812) (No. 8,403) 12, 13

The Margharita, 140 F. 820 (5th Cir. 1905)..... 13

In Re: Marine Sulphur Queen, 460 F.2d 89 (2nd Cir. 1972)..... 18

In Re: Mary Shipping, Inc., 650 F.2d 622 (5th Cir. 1981)..... 18

McQuire v. The Golden Gate, 16 F.Cas. 141 (C.C.N.D. Ca. 1856) (No. 8,001, 1850) 13

Miles v. Apex Marine, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990)..... *passim*

Morrison v. The John L. Stephens, 17 F.Cas. 838 (N. Dist. of Ca. 1861) (No. 9,847) 13

TABLE OF AUTHORITIES – Continued

Page

The Osceola, 189 U.S. 158, 23 S.Ct. 483, 46 L.Ed. 760 (1903) 14, 15

Pacific Packing, 136 F. 577 (9th Cir. 1905) 13

Patterson v. Dakin, 31 F. 682 (S.D. Ala. 1887) 14

Ralston v. The State's Rights, 20 F.Cas. 201 (E.D. Pa. 1836) (No. 11,540) 12, 13

Reed v. Canfield, 20 F.Cas. 426 (D. Mass. 1832) (No. 11,641) 6

Robinson v. Pocahontas, Inc., 447 F.2d 1048, 1973 A.M.C. 2268 (1st Cir. 1973) 17

Roza v. Smith, 65 F. 592 (N.D. of Ca. 1895) 13

Seabrook v. Raft Railraod Cross-Ties, 40 F. 596 (D.S.C. 1889) 14

The Seven Brothers, 170 F. 126 (D.R.I. 1909) 14

Sheriden v. Furbur, 21 F.Cas. 1266 (So. Dist. N.Y. 1834) (No. 12,761) 13

The State of Missouri, 76 F. 376 (7th Cir. 1896) 13, 14

Steamboat Company v. Whildin, 4 Har. 229 (Delaware 1845) 12, 13

Taber v. Jenny, 23 F.Cas. 605 (D. Mass. 1856) (No. 13,720) 14

Thompson v. Oakland, 23 F.Cas. 1064 (Dist. of Mass. 1841) (No. 13,971) 13

The Troop, 118 F. 769 (D. Wash. 1902), *affirmed*, 128 F. 856 (9th Cir.), *cert. denied*, 195 U.S. 632 (1904) 13

United States Steel Corporation v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) 18

TABLE OF AUTHORITIES – Continued

Page

Vaughn v. Atkinson, 82 S.Ct. 997, 369 U.S. 527, 8 L.Ed.2d 88 (1962) 4, 5, 6, 16, 17

The William H. Bailey, 103 F. 799 (D. Conn. 1900), *aff'd*, 111 F. 1006 (2nd Cir. 1901) 14

Yunica v. The United States, 140 F. 820 (5th Cir. 1905) 16

The Rolph, 293 F. 269 (N.D. of Ca. 1923), *affirmed*, 299 F. 52 (9th Cir.), *cert. denied*, 266 U.S. 614 (1924) 16

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1333 2

Jones Act (46 U.S.C. § 688) 2, 3, 15

MISCELLANEOUS

Benedict on Admiralty, 7th Edition, Section 5.01(E), pages 5-8 11

Benedict on Admiralty, 7th Edition, Section 2, pages 1-7 15

Benedict on Admiralty, 7th Edition, 1(B), Section 2, pages 1-10 15

Benedict on Admiralty, 7th Edition, 1(B), Section 2, pages 1-12 16

Black's Law Dictionary, 6th Edition, West Publishing 11

TABLE OF AUTHORITIES – Continued

Page

The Curse of Miles v. Apex Marine Corporation: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 Louisiana Law Review 745, at 777 .....11, 12

David W. Robinson, *Punitive Damages in American Maritime Law, Journal of Maritime Law and Commerce*, Volume 28, No. 1, January, 1997, pp. 79, 139.....10, 11, 12, 17, 18

Federal Employers Liability Act..... 15

Funk and Wagnalls, New Comprehensive International Dictionary of English Language, Deluxe Edition, 1978 11

The General Maritime Law of the United States ....*passim*

Judge John R. Brown, Admiralty Judge; [Flotsam on the Sea of *Maritime* Law], Journal of Maritime Law and Commerce, Vol. 24, No. 2, April, 1993 16

Martin J. Norris, The Law of Seamen, §26:8 at 20-21 (4th Ed.) 8

United States Constitution, Article III, Section 2, Clause 1 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Latiff, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Louisiana Supreme Court entered on December 18, 1998.

OPINIONS BELOW

All opinions below are contained in the appendices to this Petition. The Judgment of the District Court of April 3, 1997 and Reasons for Judgment of the District Court of January 29, 1997 are reproduced in the Appendix as App. 24-34. The Opinion of the Court of Appeal for the First Circuit of the State of Louisiana of September 25, 1998 is reproduced in the Appendix as App. 1-23. The Order of the Louisiana Supreme Court of December 18, 1998 denying Petitioner's Application for Supervisory Writ is contained in the Appendix as App. 35.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeal for the First Circuit of the State of Louisiana was entered on September 25, 1998 (Appendix, App. 1-23) and the Order of the Louisiana Supreme Court denying Petitioner's Application for a Supervisory Writ was denied on December 18, 1998 (Appendix, App. 35). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution (Appendix, App. 36); 28 U.S.C. 1333 (Appendix, App. 36); 46 U.S.C. § 688 (Appendix, App. 36); the General Maritime Law of the United States.

STATEMENT OF CASE

Petitioner, David Latiff, was injured on June 18, 1993, while serving as an oiler on board the M/V Mini Lymph while she was docked in New Orleans, Louisiana. While performing his duties, a piston fell, striking Petitioner's left toe and rolling over his ankle and foot. Petitioner was taken by his employer and vessel owner to the Marine Medical Unit in New Orleans on June 18, 1993 and received medical attention. On June 25, 1993, Petitioner was again taken to the Marine Medical Unit for medical treatment and was ordered by the treating physicians to stay off his foot and to see a physician for follow up treatment in one month on July 25, 1993. The M/V Mini Lymph sailed from New Orleans on July 4, 1993 and on July 25, 1993, the date Petitioner was ordered to re-visit the doctor, Petitioner's employment was terminated and no arrangements were made for his future medical care. Upon arrival at his home in Guyana, Petitioner sought further medical attention in late July of 1993, and on August 11, 1993, sent the shipowner's agent a letter regarding his medical condition and needs, including copies of his medical reports. The employer/shipowner did not respond to Petitioner's letter and did not offer to

provide any medical attention, even after the filing of suit in December of 1994 and after the deposition of the attending physician in Guyana in March of 1995.

After a trial on the merits on February 1 and 2, 1996, the district court found the defendants liable under both the Jones Act, 46 U.S.C. § 688, and the General Maritime Law. Judgment was entered for past and future loss of wages and past pain and suffering. The court additionally found the defendants' conduct " . . . in failing to provide maintenance and cure to be intentional, arbitrary, capricious and callous . . . " and awarded " . . . punitive damages and attorneys fees in the amount of $90,000.00." On appeal, the Louisiana Court of Appeal for the First Circuit affirmed the district court's finding of liability both under the Jones Act, 46 U.S.C. § 688 and the General Maritime Law doctrine of unseaworthiness. The appellate court affirmed the trial court's finding that the failure to pay Petitioner maintenance and cure was "intentional, arbitrary, capricious and callous" but held that punitive damages were not available because of the "change in the law" espoused in the Fifth Circuit decision of *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *cert. denied*, 516 U.S. 1046, 116 S.Ct. 706, 133 L.Ed.2d 622 (1996). The Louisiana First Circuit Court of Appeal reversed the $90,000.00 award for punitive damages and awarded attorneys' fees in the amount of $12,576.00. On December 18, 1998, the Louisiana Supreme Court denied Petitioner's timely application for a supervisory writ.

ARGUMENT

I. The Louisiana Supreme Court Erred in refusing to grant writs to the Louisiana First Circuit Court of Appeal for reversing the trial court's award of punitive damages to an injured seaman who was intentionally, arbitrarily, capriciously, and callously denied maintenance and cure by the vessel owner.

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), the U.S. Court of Appeal for the Fifth Circuit erroneously extended the holding of this Court's decision of *Miles v. Apex Marine*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) to eliminate a seaman's long-standing remedy and entitlement to an award of punitive damages in instances where an employer wrongfully withholds maintenance and cure. The *Miles* decision did not address the issue of punitive damages and indeed the logic of the *Miles* decision does not support the conclusion that punitive damage awards are not available to seamen.

This Court addressed the issue of maintenance and cure in *Vaughn v. Atkinson*, 82 S.Ct. 997, 369 U.S. 527, 8 L.Ed.2d 88 (1962) stating:

> "Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service and it extends during the period when he is incapacitated to do a seaman's works and continues until he reaches maximum medical recovery. The policy underlying the duty was summarized in *Calmar SS Corporation v. Taylor*, 303 U.S. 525, 58 S.Ct. 651:

> 'The reason underlying the rule to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Stuart in Harden v. Gordon, C.C. Fed. case no. 6047: The Protection of Seaman, who, as a class, are poor, friendless, and improvident from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant marine for the commercial service in maritime defense of the nation by inducing men to accept employment in an arduous and imperiless service.' "

The *Vaughn* court also made it clear that "[t]he ship owner's liability for maintenance and cure was the most pervasive of all in that it was not to be defeated by restricted distinctions nor narrowly defined." *Vaughn* at 369 U.S. 532, 8 L.Ed.2d 92, *quoting* from *Aguilar v. Standard Oil Company*, 318 U.S. 724, 730 (1943). Further, the court stated: "When there are ambiguities or doubts [regarding maintenance and cure] they are resolved in favor of the seaman." *Vaughn, Id., citing Warren v. United States*, 340 U.S. 523 (1951).

Justices Stuart and Harlen dissented from the *Vaughn* opinion and noted that a seaman was not limited, as a matter of law, to an award of damages solely for counsel fees expended in the suit for maintenance and cure. The dissenters recognized that the obligation of a ship owner to provide maintenance and cure, irrespective of fault, is an obligation of "ancient origin" which was first recognized by United States law in 1823 in the case of *Harden v.*

Gordon, 11 F.Cas. 480 (D. Maine 1823) (No. 6,047), and *Reed v. Canfield*, 20 F.Cas. 426 (D. Mass. 1832) (No. 11,641).

Most importantly, Justice Stuart acknowledged that the admiralty law included an action for punitive damages for willful nonpayment of maintenance and cure and **entitled** an injured seaman to punitive damages: "[i]f the ship owner's refusal to pay maintenance stems from a wanton and intentional disregard of the legal rights of the seaman, the latter would be **entitled to exemplary damages** in accord with traditional concepts of the law of damages. *McCormick*, Damages, Section 79. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees . . . ". *Vaughn* at 369 U.S. 540, 96 L.Ed.2d 97. *Vaughn* was this Court's most recent decision addressing the issue of maintenance and cure and this entire court recognized the availability of punitive damages. The Fifth Circuit cannot overrule the decisions of this Court by relying on a more recent opinion of this Court which does not address the issue raised therein. Absent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled *sub silentio* merely because its reasoning and result appear inconsistent with later cases. *Hopwood v. Texas*, 84 F.3d 720, 723 (5th Cir. 1996).

The *Miles* court, quite simply, did not address the issue presented by this case. The *Miles* court held that the application of the Jones Act limited the scope of damages available to a seaman suing his employer for personal injury under the Act. The *Miles* court based its decision upon the premise that Congress, when enacting the Jones

Act, was aware of the *existing* jurisprudence that precluded awards of non-pecuniary damages under FELA and, since the Jones Act incorporated FELA, the Jones Act also precluded awards of non-pecuniary damage awards to seamen. The *Miles* court held that where a seaman's cause of action for personal injuries against his employer arose under the Jones Act only pecuniary damages were available. The only remedy affected by the *Miles* decision was the scope of damages available to a seaman under the Act. That is **all** that the *Miles* court held and no extension of the decision is warranted under law.

Since 1920, the date of the passage of the Jones Act, a seaman's cause of action against his employer for negligence arises solely from the force of the Jones Act. Prior to the enactment of the Jones Act, a seaman did not have a cause of action under the maritime law against his employer for personal injuries or death arising as a result of the employer's fault. The Jones Act was clearly and unequivocally remedial legislation enacted to expand the scope of remedies available to seamen. The Jones Act was not enacted to restrict or contract the remedies available to a seaman. A seaman's right to maintenance and cure clearly does not arise from the remedy created by the Jones Act. A seaman's right to maintenance and cure is of ancient origin under the maritime law:

> The ancient duty of the vessel and shipowner to provide the sick and injured seaman with maintenance and cure arises from the contract of employment and the peculiar relationship existing between the seaman and his vessel. It is an obligation imposed by the general maritime law on the shipowner and the vessel. It does not rest upon negligence or culpability on the part of the

> owner or master and it is not restricted to those instances where the seaman's employment is the cause of the injury or illness.
>
> * * *
>
> A suit for maintenance and cure can be distinguished from a suit to recover damages for personal injury under the Jones Act as in the latter instance recovery is based upon acts of omission or commission, i.e. negligence, whereas the recovery for wages, maintenance and cure is a matter of right and is not predicated upon the culpability of the master, owner or vessel.
>
> Maintenance and cure is not an award of compensation for the disability or damages suffered.

Martin J. Norris, *The Law of Seamen*, § 26:8 at 20-21 (4th Ed.).

Under the Jones Act, Congress provided a seaman a cause of action against his *employer* for a seaman's personal injuries resulting from the *fault* of the employer. Under the Jones Act no mention is made of and no remedy was created relating to a seaman's cause of action against a shipowner and the vessel for maintenance and cure. That is so because the General Maritime Law has always recognized such a cause of action. The Jones Act, as remedial legislation, only addressed the creation of a remedy which did not exist, the seaman's cause of action against his employer for personal injury or death result from the employer's fault.

As was noted above in the cited passages from *The Law of Seamen*, the seaman's cause of action for maintenance and cure exists without reference to injury or fault and the obligation is imposed upon the *vessel* and the

shipowner under the General Maritime Law. The seaman's cause of action for maintenance and cure was not created by the Jones Act and it certainly was not eliminated or limited by the Act. To suggest that remedial legislation which created a cause of action based upon fault and against an entirely distinct party thereby effected a repeal or limitation upon a cause of action against distinct parties is quite simply unsupportable.

The *Guevara* court's logic represents a strained and contorted interpretation of the Jones Act and the *Miles* decision. According to the *Guevara* court the Jones Act limits a seaman's recovery against his employer to those damages enumerated in the Act and, therefore, punitive damages are not available to the seaman in an action against the vessel or the vessel owner. The *Guevara* court does, however, opine that a seaman may still recover attorneys' fees where maintenance and cure has been wrongfully withheld. This is an amazing statement in light of that court's reasoning. If the Jones Act operates to limit a seaman's recovery to the remedies specifically set forth in the Act, what then could be the source of an award for attorneys' fees? The Jones Act makes no mention of attorneys' fees and attorneys' fees have never been allowed under the Act! Clearly the source of the attorneys' fee award must be the General Maritime Law. This is the same General Maritime Law which also provides a seaman with a punitive damage remedy!

This Court's decision in *Miles* did mention punitive damages on the first page of its opinion, however, the court chose not to address the issue in that case, instead it focused on loss of society. The lower federal court in *Miles* did recognize the availability of punitive damages,

however, Judge Rubin, writing for the Fifth Circuit in *Miles*, decided that punitive damages were not available **based on the facts of that case.**[1]

In *Miles*, this Court did not address punitive damages when it had the clear opportunity to do so. This Court did not even insinuate that punitive damages were unavailable, therefore, the Fifth Circuit should not be allowed to change the law by extending the holding of *Miles*.

With respect to the *Guevara* decision, Professor David W. Robinson has done a stellar job of tracing the historical inaccuracies and flawed assumptions which laid the groundwork for the Fifth Circuit's misinterpretation of the *Miles* decision. Professor Robinson begins his article by discussing the terminology used by the courts in evaluating pecuniary, non-pecuniary and punitive damage awards. The court in *Guevara*, and courts following that reasoning, have forced punitive damages into the non-pecuniary damages definitional pigeonhole and by doing so have precluded their recovery post-*Miles*. This simply does not accurately reflect how this Court has classified damages in the past. Damages are correctly categorized as either compensatory or punitive and, as Professor Robinson shows, there is a further breakdown of the two categories under the compensatory branch, those being pecuniary damages (loss earnings, medical expenses, loss

---

[1] David W. Robinson, *Punitive Damages in American Maritime Law, Journal of Maritime Law and Commerce*, Volume 28, No. 1, January, 1997, pp. 79, 139.

of support, loss of services) and non-pecuniary damages (pain and suffering and loss of society).[2]

Professor Robinson explains that the pecuniary/non-pecuniary distinction has no useful application in the punitive damages discussion.[3] The leading treatise on the law of admiralty states:

> Punitive damages are . . . recoverable under the general maritime law and are awarded "over and above" the compensation received for plaintiff's injuries or death. These damages are attended as a civil penalty to discourage the wrongdoer and others from the similar acts in the future. Although some courts consider punitive damages to be a form of non-pecuniary recovery, these damages are truly separate in nature and should be treated individually and apart from non-pecuniary damages.[4]

The term pecuniary means consisting of or relating to money; or having a monetary penalty; entailing a fine.[5] Black's Law Dictionary defines pecuniary loss as a loss of money, or something by which money or something of money value may be acquired.[6] Since punitive damages are always awarded in money, they clearly fall within

---

[2] *Robinson*, supra at page 81.

[3] *The Curse of Miles v. Apex Marine Corporation*: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases, 55 Louisiana Law Review 745, at 777.

[4] *Benedict on Admiralty*, 7th Edition, Section 5.01(E), pages 5-8.

[5] Funk and Wagnalls, New Comprehensive International Dictionary of English Language, Deluxe Edition, 1978.

[6] Black's Law Dictionary, 6th Edition, West Publishing.

both the legal and plain English definition of pecuniary damages. Putting semantics aside, the true question to be decided is whether punitive damages were available at the time the *Miles* decision was rendered.

Historically, punitive damages have been awarded in admiralty.[7] What is referred to today as punitive damages were previously broken down into three distinct types of damages, each having a separate purpose. The three forms of damages were (1) vindictive damages, (2) smart money damages, and (3) exemplary damages.[8] Vindictive damages emphasized a type of punishment function. Smart money damages played a *quasi*-compensatory function and were used to redress the victim's wounded feelings rather than focusing on punishment. Exemplary damages emphasized a deterrent function, both as to the particular defendant as well as to other similarly-situated defendants.[9]

These three distinct concepts began blurring together as early as 1851.[10] Although the courts began using the term punitive damages to represent all three distinct ideas, it is important to remember that even as the term is used today it continues to serve three separate and distinct functions: to compensate the victim for the egregious nature of the defendant's act (compensatory function), to punish this defendant for the egregious

---

[7] *The Lively*, 15 F.Cas. 631 (C.C.D. 1812) (No. 8,403); *Ralston v. The State's Rights*, 20 F.Cas. 201 (E.D. Pa. 1836) (No. 11,540); *Steamboat Company v. Whildin*, 4 Har. 229 (Delaware 1845).

[8] *Robinson*, supra at pages 82-83.

[9] *Id.*

[10] *Day v. Woodworth*, 54 U.S. 363 (1851).

nature of his act (vindictive function) and to deter others from participating in similar acts (exemplary function).[11] One federal district court has stated, "[w]hether characterized as pecuniary or non-pecuniary damages, as early as the *Amiable Nancy*, the General Maritime Law contemplated punitive damages . . . ".[12]

There are numerous reported decisions prior to the enactment of the Jones Act which awarded punitive damages in the admiralty setting. Punitive damages were not only awarded to seamen[13] for the egregious acts perpetrated on them, but also to passengers,[14] non-seamen and non-passengers,[15] as well as for property damage, collision,

---

[11] *Ellender v. Texaco, Inc.*, 640 So.2d 845 (1st Cir. 1994).

[12] *Duplantis v. Texaco, Inc., et. al.*, 771 F. Supp. 787 (E.D.La. 1991).

[13] *Gould v. Christianson*, 10 F.Cas. 857 (So. Dist. N.Y. 1936) (No. 5,636); *Jay v. Almay*, 13 F.Cas. 387 (C.C.D. Mass. 1846) (No. 7,236); *Thompson v. Oakland*, 23 F.Cas. 1064 (Dist. of Mass. 1841) (No. 13,971); *Hudson v. Jordan*, 12 F.Cas. 1089 (D.Me. 1837) (No. 6,959); *Sheriden v. Furbur*, 21 F.Cas. 1266 (So. Dist. N.Y. 1834) (No. 12,761); *City of Carlisle*, 39 F. 807 (D. Or. 1889); *The Troop*, 118 F. 769 (D. Wash. 1902), *affirmed*, 128 F. 856 (9th Cir.), *cert. denied*, 195 U.S. 632 (1904); *Pacific Packing*, 136 F. 577 (9th Cir. 1905); *The Margharita*, 140 F. 820 (5th Cir. 1905).

[14] *Chamberlain v. Chandler*, 5 F.Cas. 413 (C.C.D. Mass. 1823) (No. 2,575); *McQuire v. The Golden Gate*, 16 F.Cas. 141 (C.C.N.D. Ca. 1856) (No. 8,001, 1850); *Gallagher v. The Yankee*, 9 F.Cas. 1091 (N. Dist. of Ca.) (No. 5,196), *affirmed*, 30 F.Cas. 781 (C.N.D. Ca. 1859) (No. 18,124); *Morrison v. The John L. Stephens*, 17 F.Cas. 838 (N. Dist. of Ca. 1861) (No. 9,847).

[15] *Ralston v. The State's Rights*, 20 F.Cas. 201 (E.D. Pa. 1836) (No. 11,540); *Steamboat Company v. Whildin*, 4 Har. 229 (Delaware 1845); *The Lively*, 15 F.Cas. 1631 (C.C.D. Mass. 1812) (No. 8,403); *Roza v. Smith*, 65 F. 592 (N.D. of Ca. 1895); *The State of Missouri*,

and conversion.[16]

As explained in *Gould v. Christianson*, 10 F.Cas. 875 (So. Dis. N.Y. 1936) (No. 5,636), public policy concerns warrant the award of punitive damages:

> The country has . . . a deep interest in encouraging young men of capacity, ambition and good character, to seek employment in the Merchant Marine and in having the ship of the merchant . . . become a school to his employees . . . [the harm done to seamen by his employer] is not, then, . . . to be estimated solely by the consideration of the positive bodily harm which accompanied it; but the misconduct of the respondent is to be measured with some regard, also, to the broader interests, both of navigation and those of a public nature, affected by it, in view of its tendency to deter sensitive and worthy young men from entering the merchant's service as mariners. (Id. at 864).

In 1903 this Court handed down *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 46 L.Ed. 760 (1903), which made clear that seamen had no remedy against a shipowner for injuries caused by the negligence of the ship's master, its

---

76 F. 376 (7th Cir. 1896); *The General Rucker*, 35 F. 152 (W.D. of Tenn. 1888).

[16] *The Seven Brothers*, 170 F. 126, 127 (D.R.I. 1909); *The William H. Bailey*, 103 F. 799, 800 (D. Conn. 1900), *aff'd*, 111 F. 1006 (2nd Cir. 1901); *Seabrook v. Raft Railroad Cross-Ties*, 40 F. 596, 601 (D.S.C. 1889); *The Harriet Newhall*, 11 F.Cas. 598-99 (D. Mass. 1856) (No. 6,102); *Guttner v. Pacific Steam Whaling Co.*, 96 F. 617, 620 (N.D. Cal. 1899); *Taber v. Jenny*, 23 F.Cas. 605, 609 (D. Mass. 1856) (No. 13,720); *The Elzina Lines*, 102 F. 184, 191 (C.C.D. Mass. 1900), *rev'd on other grounds*, 199 U.S. 119 (1905); *Patterson v. Dakin*, 31 F. 682, 685 (S.D. Ala. 1887).

officers, or its crew.[17] In 1920, Congress enacted the Jones Act which statutorily overruled *The Osceola* and expanded the admiralty law by providing seamen with a cause of action against their employers for injury or death caused by negligence.[18] Congress, through the Jones Act, incorporated the Federal Employers Liability Act. The judicial interpretations under FELA, a railroad worker's relief act, do not necessarily measure the full extent of the seamen's rights under the Jones Act.[19] In passing the Jones Act, Congress did not specifically enumerate the rights of seamen but merely added to those remedies the same rights granted by FELA:

> The Jones Act in providing that a seaman should have the same right of action as what a railroad employee has, does not mean that the very words of the FELA must be lifted bodily from their contacts and applied mechanically to the specific facts of maritime events, rather it means that those contingencies against which Congress has provided to insure recovery to railroad employees should also be met in the admiralty setting.[20]

The Jones Act is a separate and distinct cause of action from a seaman's claim for maintenance and under the General Maritime Law. Originally, it was thought that the

---

[17] *Benedict on Admiralty*, 7th Ed. Section 2, pages 1-7.

[18] 46 U.S.C. § 688.

[19] *Benedict on Admiralty*, 7th Edition, 1(B) Section 2, pages 1-10.

[20] *Cox v. Roth*, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955).

Jones Act required the seaman to choose between pressing a Jones Act claim or a claim under the General Maritime Law. It is now clear that a seaman need not elect but that both may be brought in a single cause of action for damages.[21] It is at this point where the Fifth Circuit in *Guevera* confused the *Miles* rationale by refusing to recognize the distinction between the Jones Act, which is a Congressional mandate, and the unfettered right of a seaman to maintenance and cure.

It is clear that the remedies provided by the Jones Act are remedial in nature and must be liberally construed to carry out the statute's purpose, which was to **enlarge admiralty's protection to its wards.**[22] The punitive damage cause of action was an established remedy before the enactment of the Jones Act and the Jones Act's purpose was not to eliminate existing remedies but merely to expand the scope of recovery by establishing a new cause of action based on employer negligence.[23]

Even after the enactment of the Jones Act, punitive damages continued to be awarded in admiralty.[24] The case of *Vaughn v. Atkinson* made it absolutely clear that

---

[21] *Benedict on Admiralty*, 1(B), Section 2, pages 1-12; *Baltimore SS Company v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927).

[22] *Garrett v. Moore-McCormack Company*, 63 S.Ct. 246, 317 U.S. 239, 87 L.Ed. 239 (1942).

[23] *See* Judge John R. Brown, Admiralty Judge; [Flotsam on the Sea of *Maritime* Law], Journal of Maritime Law and Commerce, Vol. 24, No. 2, April, 1993.

[24] *Yunica v. The United States*, 140 F. 820 (5th Cir. 1905); *The Rolph*, 293 F. 269 (N.D. of Ca. 1923), *affirmed*, 299 F. 52 (9th Cir.), *cert. denied*, 266 U.S. 614 (1924).

attorneys' fees are recoverable by a plaintiff in the General Maritime Law's action for maintenance and cure when an employer wantonly and intentionally withholds those payments to an injured seaman. The Court in *Vaughn v. Atkinson* stated that:

> [I]f the ship owners refusal to pay maintenance stem from a wanton and intentional disregard the legal rights of seaman, the latter would be entitled to **exemplary damages in a court with traditional concepts of the law of damages**. All the amounts awarded would be in the discretion of the fact finder and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.

The above quote shows that this Court recognized that while attorneys' fees are not normally awarded to a seafarer, a court could make such an award under the authority of existing punitive damage remedies of the General Maritime Law. After *Vaughn*, the U.S. First Circuit issued its decision in *Robinson v. Pocahontas, Inc.*, 447 F.2d 1048, 1973 A.M.C. 2268 (1st Cir. 1973) and affirmed a $10,000.00 punitive damage award against a ship owner. The Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits subsequently followed the First Circuit's decision in *Robinson* citing *Vaughn* in support of the punitive damages awards.[25] The Second, Fifth, Sixth and Ninth U.S. Federal

---

[25] *Robinson*, supra at page 130.

Circuits have all indicated that punitive damages are available in post-Jones Act cases under the General Maritime Law.[26]

Rather than creating "uniformity" the *Guevara* court has created a conflict among the federal circuits as well as state courts. This Court is called upon, therefore, to decide the issue of whether punitive damages may be awarded to a seaman where maintenance and cure has been intentionally, arbitrarily, capriciously, and callously denied.

CONCLUSION

The Louisiana Supreme Court and the Louisiana Court of Appeals for the Fifth Circuit clearly erred by relying upon a decision of a lower federal court to overrule prior jurisprudence of this honorable court. It is absolutely clear that the *Miles* decision has no application to the type of case before this Court and, therefore, this

---

[26] *Robinson*, supra at page 131; *In Re: Marine Sulphur Queen*, 460 F.2d 89 (2nd Cir. 1972); *In Re: Mary Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981); *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969); *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987).

Court should grant this application to provide the lower courts with authoritative guidance on this issue.

Respectfully submitted,

RICHARD J. DODSON,
Bar Roll No. 4982
DODSON & VIDRINE
A Professional Law Corporation
628 North Boulevard
Baton Rouge, Louisiana 70802
Telephone (225) 344-0633
Counsel for David Latiff

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

97 CA 1819

DAVID LATIFF

VERSUS

ELMINI LYMPH, INC., CERES HELLENIC ENTERPRISES, LTD., AND THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.

* * *

JUDGMENT RENDERED: ***September 25, 1998***

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT (NUMBER 54,712), PARISH OF ASCENSION, STATE OF LOUISIANA

HONORABLE ALVIN TURNER, JR., JUDGE

* * *

Scott A. Soule
Derek A. Walker
New Orleans, Louisiana

Counsel for Defendants/Appellants, Elmini Lymph, Inc., Ceres Hellenic Enterprises, Ltd., and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd.

Richard J. Dodson
David C. Vidrine
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellee, David Latiff

* * *

BEFORE: GONZALES, KUHN AND WEIMER, JJ.

GONZALES, J.

In this admiralty action, the trial court entered judgment awarding special and general damages in favor of a seaman and against the ship owner, the ship owner's agent, and the ship owner's insurer. From this judgment, the defendants appeal, contesting liability, quantum, and certain evidentiary matters. The plaintiff also appeals, seeking an increase in damages.

FACTS AND PROCEDURAL HISTORY

On June 18, 1993, David Latiff, a Guyanese citizen, was injured during the course and scope of his employment as an oiler[1] aboard the M/V MINI LYMPH, a cargo ship, while it was docked in New Orleans, Louisiana. Latiff was cleaning a piston from one of the ship's engines, when the piston fell on his left great toe and rolled over his ankle and foot. Latiff was taken to a medical clinic where he was diagnosed with a broken toe and advised not to work. After a follow-up visit to the clinic on June 25, 1993, Latiff was instructed to remain off of his feet and to have his injury checked again in one month. The M/V MINI LYMPH sailed from New Orleans on or around July 4, 1993, and arrived in Suriname, South America, on July 25, 1993. The following day, Latiff's employment on the M/V MINI LYMPH was terminated.

---

[1] Latiff's position aboard the M/V MINI LYMPH is characterized as an "oiler" or a "wiper" in the record. Latiff testified that an oiler and a wiper are interchangeable terms describing the same position.

Latiff returned to Guyana where he sought medical treatment for his foot which was swollen and painful. He wore a cast on his left leg from knee to toe for eight to ten weeks, and was then prescribed cortisone injections, hot pack therapy, and oral medications. Latiff did not return to work following his termination from employment aboard the M/V MINI LYMPH.

On December 7, 1994, Latiff filed suit against Elmini Lymph, Inc., the owner of the M/V MINI LYMPH; Ceres Hellenic Shipping Enterprises, Ltd., the agent which hired him to work aboard the M/V MINI LYMPH; and The United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd., an insurer alleged to provide insurance coverage for the liability asserted in his petition (defendants). Claiming status as a seaman, Latiff alleged the defendants were liable to him for negligence under the Jones Act, for breach of the duty to provide a seaworthy vessel under general maritime law, and for punitive damages for failure to provide a seaworthy vessel and failure to pay maintenance, wages, and cure.

After a trial held on February 1-2, 1996, the trial court signed a judgment awarding Latiff $141,346.16 in special, general, and punitive damages, and attorney fees. The trial court found: (1) Latiff sustained a fracture in the region of his ankle while employed on the M/V MINI LYMPH; (2) the M/V MINI LYMPH was unseaworthy at the time of the accident and this unseaworthiness was a cause in fact of Latiff's accident; (3) the defendants were negligent for failing to provide Latiff with a reasonably safe workplace and for failing to provide adequate supervision or proper safety instructions; and (4) the defendants arbitrarily and capriciously refused to provide

Latiff with maintenance and cure, subjecting them to punitive damages and attorney fees.

The defendants appeal, asserting the following assignments of error:

> 1. The trial court erred in finding the defendants liable for any percentage of Latiff's damages.
>
> 2. The trial court erred in adjudging the defendants liable for punitive damages in connection with Latiff's maintenance and cure claim.
>
> 3. The trial court erred in admitting and relying on opinions of two physicians and an economist.

Latiff answered the appeal, seeking an increase in damages.

EVIDENTÍARY ISSUES

Because our resolution of the merits of this case requires that we only consider evidence properly admitted before the trial court, we first address the defendants' assignment of error dealing with evidentiary issues. The defendants contend that the trial court erred in admitting and relying upon the (1) the deposition of Dr. Noel Perez, one of Latiff's treating physicians in Guyana, (2) the deposition of Dr. G. Randolph Rice, an economist, and (3) the testimony of Dr. Alonzo Nelson Diodene, Jr., an orthopedic surgeon who treated Latiff in late 1995 and early 1996.

1. Admission of Dr. Perez's deposition

The defendants contend Dr. Perez's deposition was inadmissible because he was not properly tendered or accepted as an expert in any field of medicine at the time his deposition was taken.

Ordinarily, a witness must be qualified before he gives expert opinion. La. C.E. art. 702; ***State v. Clark,*** 340 So.2d 208, 219 (La. 1976), *cert. denied sub nom.* ***Clark v. Louisiana,*** 430 U.S. 936, 97 S.Ct. 1563, 51 L.Ed.2d 782 (1977).[2] The transcript of Dr. Perez's deposition indicates that, although Latiff's attorney questioned him regarding his credentials as an orthopedic surgeon, the attorney never tendered Dr. Perez as an expert. This was error since Latiff offered Dr. Perez's testimony at trial as expert testimony. It was also error for the trial court to accept Dr. Perez as an expert witness when he was never tendered as such. However, error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and a timely objection appears of record, stating the specific ground for the objection. La. C.E. art. 103(A)(1). In this case, although defendants' counsel objected to the admission of Dr. Perez's deposition at trial, defendants' counsel did not object to this error at the time the deposition was taken. The equitable basis of the contemporaneous objection rule provided in

---

[2] Although the ***Clark*** court relief upon former La. R.S. 15:466 which specifically required that the competency of an expert witness be established prior to his testimony, the same rule is embodied in La. C.E. art. 702 which superseded former La. R.S. 15:466 when the Louisiana Code of Evidence became effective January 1, 1989.

La. C.E. art. 103(A)(1) is to require that an objection be made at a time when the party offering the evidence has the ability to cure the subject of the objection. *See* ***State v. McCutcheon,*** 93-0488 (La. App. 1st Cir. 3/11/94), 633 So.2d 1338, 1344, *writ denied,* 94-0834 (La. 6/17/94), 638 So.2d 1093. Further, La. C.C.P. art. 1455 provides that when an objection to the competency of a witness is one which might have been obviated or removed if promptly presented, the objection is waived unless seasonably made at the taking of the deposition. Herein, during Dr. Perez's deposition, no objection was made that he was providing expert opinion testimony without having first been tendered and accepted by the other side as an expert. It was unjust to make the objection for the first time at trial because it was then too late to correct the error.[3] Thus, in accordance with La. C.C.P. art. 1455, we conclude the defendants waived their right to object to Latiff's failure to tender Dr. Perez as an expert.

2. Admission of Dr. Rice's deposition

The defendants also argue that the trial court erred in admitting the deposition of Dr. G. Randolph Rice, an economist who testified regarding Latiff's past and future income losses as a result of his injury. The defendants contend that Dr. Rice's opinion should not have been relied upon by the trial court because Dr. Rice used economic data (discount rates, interest rates, inflation rates, work life expectancy data) applicable to a lost

---

[3] Dr. Perez did not attend the trial of this matter. He was in a foreign country when his deposition was submitted into evidence.

income calculation of a United States citizen, when Latiff is a citizen of Guyana. In his deposition, Dr. Rice admitted his calculations of Latiff's lost income were based on United States economic data. The defendants introduced no evidence to contradict the income loss figures provided by Dr. Rice.

The testimony of any witness, lay or expert, is not binding on the trier of fact. ***Patterson v. Long,*** 96-0191 (La. App. 1st Cir. 11/8/96), 682 So.2d 1327, 1331, *writ denied,* 96-2958 (La. 2/7/97), 688 So.2d 499; ***Doiron v. Wal-Mart Stores, Inc.,*** 95-1705 (La. App. 1st Cir. 4/4/96), 672 So.2d 249, 253. However, when expert testimony is offered to prove a fact, and the testimony is uncontradicted, it may not be lightly disregarded by the trier of fact. In the absence of circumstances in the record that cast suspicion on the reliability of the testimony, the expert's uncontradicted testimony should be accepted as true. ***Mathews v. Dousay,*** 96-858 (La. App. 3d Cir. 1/15/97), 689 So.2d 503, 510; *see* ***Anderson v. Bennett Wood Fabricators,*** 571 So.2d 780, 786 (La. App. 2d Cir. 1990), *writ denied,* 573 So.2d 1135 (La. 1991); ***Geismar v. General Gas Corporation,*** 182 So.2d 769, 781 (La. App. 1st Cir.), *writ denied,* 249 La. 59, 184 So.2d 733 (1966).

In this case, Dr. Rice's economic figures regarding Latiff's lost income were uncontradicted by the defendants. Although, on appeal, they challenge the factual accuracy of the data Dr. Rice used, the defendants introduced no evidence at the trial to show what Latiff's lost income would have been had economic data from Guyana been used. The trial court accepted Dr. Rice's expert opinion, and there is no evidence in the record demonstrating that economic data from Guyana should

have been used, or that calculations based on Guyanese data would have been any different than the figures provided by Dr. Rice.[4]

The trial court has great discretion in determining the effect and weight to be given expert testimony. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, appellate courts will not reject the testimony of an expert or find reversible error. ***McCurdy v. Ault***, 94-1449 (La. App. 1st Cir. 4/7/95), 654 So.2d 716, 719, *writ denied*, 95-1712 (La. 10/13/95), 661 So.2d 498. We conclude that the trial court did not abuse its discretion in accepting Dr. Rice's testimony in this case.

3. Admission of Dr. Diodene's testimony

The defendants contend that Dr. Alonzo Nelson Diodene, Jr., an orthopedic surgeon who treated Latiff in late 1995 and early 1996, should not have been allowed to testify because his treatment resulted only because Latiff was in the United States for several months prior to the trial due to several trial continuances; presumably, this is an objection to the relevancy of Dr. Diodene's testimony. The defendants cite no authority for striking Dr.

---

[4] We note that the trial court did rely on Dr. Rice's calculations in arriving at an amount to award Latiff for future lost wages, which is the only part of the award arguably affected by using United States economic data rather than Guyanese economic data. Because the award for future lost wages was only for a period of six months, any erroneous reliance on United States economic data probably resulted in only a negligible difference in the calculation of the award made.

Diodene's testimony on this basis nor did they raise this basis for objection before the trial court.[5]

An appellate court has the power to do justice on the record irrespective of whether a particular legal point or theory was made, argued, or passed on by the court below. La. C.C.P. art. 2164; ***Georgia Gulf Corporation v. Board of Ethics for Public Employees,*** 96-1907 (La. 5/9/97), 694 So.2d 173, 176. However, an appellate court generally limits its review to issues which were submitted to the trial court, unless the interest of justice clearly requires otherwise. Rule 1-3, Uniform Rules – Courts of Appeal; ***Stockstill v. C.F. Industries, Inc.,*** 94-2072 (La. App. 1st Cir. 12/15/95), 665 So.2d 802, 811-812, *writ denied,* 96-0149 (La. 3/15/96), 669 So.2d 428. Under the circumstances of this case, we decline to review defendants' argument that Dr. Diodene's testimony should not have been admitted, because this argument was not first presented to the trial court.

We now turn to the substantive issues raised by the parties on appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

In general maritime and Jones Act cases, a Louisiana appellate court should apply Louisiana's manifest error – clearly wrong standard of review to factual findings. ***Foster v. Destin Trading Corporation,*** 96-0803 (La. 5/30/97), 700 So.2d 199, 202; ***Milstead v. Diamond M***

---

[5] Although the defendants did object to the introduction of Dr. Diodene's testimony at trial, the objection was not made on the same basis asserted on appeal.

Offshore, Inc., 95-2446 (La. 7/2/96), 676 So.2d 89, 96. The two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trial court, and 2) whether the record further establishes that the finding is not manifestly erroneous. ***Mart v. Hill,*** 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trial court's finding, no additional inquiry is necessary. However, if a reasonable factual basis exists, an appellate court may set aside a trial court's factual finding only if, after reviewing the record in its entirety, it determines the trial court's finding was clearly wrong. ***Stobart v. State, Department of Transportation and Development,*** 617 So.2d 880, 882 (La. 1993). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. ***Stobart,*** 617 So.2d at 882-883; ***Morris v. Norco Construction Company,*** 632 So.2d 332, 335 (La. App. 1st Cir. 1993), *writ denied,* 94-0591 (La. 4/22/94), 637 So.2d 163.

The Louisiana Supreme Court has stated that federal substantive admiralty or maritime law applies to Jones Act or general maritime law claims instituted in a Louisiana state court. ***Lejano v. K.S. Bandak,*** 97-0388 (La. 12/12/97), 705 So.2d 158, 163, *petition for cert. filed,* 97-1882, 66 USLW 3774 (5/22/98).

The Unseaworthiness Claim

Generally, a vessel owner[6] warrants his vessel to be seaworthy, and this duty is independent of the duty to exercise reasonable care under the Jones Act, 46 U.S.C.A. §688. To be seaworthy, a vessel and its appurtenances, gear, and equipment must be reasonably suited for the use for which they were intended. ***Hae Woo Youn v. Maritime Overseas Corporation,*** 605 So.2d 187, 198 (La. 5th Cir. 1992), *modified on other grounds,* 623 So.2d 1257 (La. 1993). The owner's duty to provide a seaworthy vessel is absolute in the sense that actual or constructive knowledge by the owner is not necessary to support liability. Liability under the doctrine of unseaworthiness does not rest upon fault or negligence. ***Johnson v. Offshore Express, Inc.,*** 845 F.2d 1347, 1354 (5th Cir. 1988), *cert. denied,* 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988); ***Jenkins v. Sonat Offshore U.S.A. Inc.,*** 96-2504 (La. App. 1st Cir. 12/29/97), 705 So.2d 1184, 1187. Thus, if an owner does not provide a seaworthy vessel, then no amount of prudence will excuse him, whether he knew of or should have known of the unseaworthy condition. ***Foster v. Destin Trading Corporation,*** 700 So.2d at 202. However, the owner is not required to provide an accident-free ship; seaworthiness does not require perfection, but only reasonable fitness. ***Mitchell v. Trawler Racer, Inc.,*** 362 U.S. 539, 550, 80 S.Ct. 926, 933, 4 L.Ed.2d 941 (1960).

---

[6] On appeal, the defendants raise no issue as to the ownership of the M/V MINI LYMPH.

In order to prove unseaworthiness, a plaintiff must show that the unseaworthy condition was the proximate cause of his injury. ***Johnson v. Offshore Express, Inc.***, 845 F.2d at 1354. To establish proximate cause, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness. ***Brister v. A.W.I., Inc.***, 946 F.2d 350, 355 (5th Cir. 1991).

The trial court concluded that the M/V MINI LYMPH was unseaworthy at the time of Latiff's accident and the unseaworthiness was the cause of the accident. In reasons for judgment, the trial court stated "[t]he piston fell from its chain block during normal use" and "[t]his [was] a classic case of unseaworthiness where an article of the vessel's equipment [failed] under proper and expected use."

Latiff testified that his duties as an oiler included keeping the engine room of the ship clean and oiling the engines. On the date of the accident, Ramon Gonzales, the port engineer, instructed Latiff to remove a piston from one of the ship engines to be cleaned. The record indicates that each piston from an engine of the M/V MINI LYMPH weighed over 200 pounds. After Gonzales threaded an eye bolt into the piston, Latiff hoisted the piston from the engine using a chain block. Once the piston was suspended approximately 4-5 feet above the floor, Latiff tied it off, removed the piston rings, and began cleaning the piston with sandpaper at the location where the piston rings usually fit. While Latiff was cleaning the suspended piston, it became unsecured and fell.

The connecting rod on the piston hit Latiff's left great toe and then the piston rolled over his ankle.

According to Latiff, Gonzales witnessed the accident and sounded an alarm to summon the ship's port captain. Latiff testified that Captain Giannis Sirnokis came down to the engine room and instructed other crew members to assist him from the engine room. Latiff was then taken to the Marine Medical Unit where x-rays were taken, and he was diagnosed with a broken left great toe, which was splinted and wrapped with tape.

Ramon Gonzales testified at trial and by deposition. He stated that he was an assistant port engineer from a land-based crew hired to perform maintenance work on machinery in the M/V MINI LYMPH'S engine room while it was docked in New Orleans. Gonzales denied that he instructed Latiff to clean the piston and explained that overhauling the pistons from a ship engine requires the special skills of a port engineer and that these skills are not possessed by an oiler such as Latiff. Gonzales also denied seeing Latiff injured in an accident in the M/V MINI LYMPH's engine room on June 18, 1993, and claimed that, in his entire experience as a port engineer, he had never experienced or witnessed an accident in a ship's engine room. Gonzales did remember seeing Latiff in the engine room on the day of the accident, but testified that Latiff's only duty was to clean the piston cylinder covers.

Giannis Sirnokis, the M/V MINI LYMPH's port captain while it was docked in New Orleans, also testified at trial. Sirnokis stated that he was responsible for maintaining the ship's log book, article list, crew list, and ship

certificates, as well as for keeping the ship's money, paying the wages of the crew, and communicating with port authorities. He denied that any accident occurred aboard the M/V MINI LYMPH on June 18, 1993, stating that any such accident would have been reported in the ship's log book, and that no report had been made. He also denied being summoned to the engine room and did not remember sending Latiff to the Marine Medical Unit for treatment.

In concluding that Latiff had carried his burden of proving that the M/V MINI LYMPH was unseaworthy, the trial court noted that it was required to make certain credibility determinations due to conflicting testimony regarding the existence of an accident on June 18, 1993. In reasons for judgment, the trial court stated that, after observing the witnesses in court and considering the evidence as a whole, it accepted Latiff's testimony as true and discounted the testimony of both Gonzales and Sirnokis, whose testimony the trial court did not find credible. Despite the fact that both of these witnesses denied Latiff was injured aboard the M/V MINI LYMPH on the day at issue, the trial court noted that objective documentary evidence in the record, presumably the medical records from the Marine Medical Unit, and from Latiff's treating physicians, was consistent with the occurrence of an injury as described by Latiff.

In a trial where causation and credibility are major issues, the trial court's factual determinations are entitled to great deference. *Guillory v. Insurance Company of North America*, 96-1084 (La. 4/8/97), 692 So.2d 1029, 1032. Further, a finding of unseaworthiness is a factual determination reviewed under the manifest error-clearly erroneous

standard. *Griffin v. LeCompte,* 471 So.2d 1382, 1387 (La. 1985). In this case, the trial court was presented with conflicting views of the evidence and chose to assign more credibility to Latiff's claim that the piston fell on his foot than to Gonzales' and Sirnokis' claims that no accident occurred. There is a reasonable factual basis in the record from which the trial court could have concluded that the accident occurred in the manner described by Latiff. Further, the trial court's conclusion that the piston fell from the chain block during normal use onto Latiff's foot and that this rendered the M/V MINI LYMPH unseaworthy is not clearly wrong. The trial court reasonably concluded that some part of the mechanism being used to suspend the piston failed during normal use and was not reasonably suited for the purpose of supporting the piston which weighed over 200 pounds. We find no manifest error in the trial court's determinations of causation, credibility, or unseaworthiness.

Because we affirm the district court's conclusions that the M/V MINI LYMPH was unseaworthy, we need not address the district court's further conclusion that the defendants were negligent for failing to provide Latiff with a reasonably safe workplace and for failing to provide adequate supervision or proper safety instructions.

PUNITIVE DAMAGES AND ATTORNEY FEES

The defendants claim the trial court erred in awarding Latiff punitive damages and attorney fees for their failure to pay him maintenance and cure. In its reasons for judgment, the trial court stated, "This Court finds the [defendants'] conduct in failing to provide maintenance

and cure to be intentional, arbitrary, capricious, and callous and award punitive damages and attorney's fees in the amount of $90,000.00."

In ***Guevara v. Maritime Overseas Corporation,*** 59 F.3d 1496 (5th Cir. 1995), *cert. denied,* 516 U.S. 1046, 116 S.Ct. 706, 133 L.Ed.2d 662 (1996), the United States Fifth Circuit Court of Appeals overruled prior jurisprudence allowing the recovery of punitive damages for the willful nonpayment of maintenance and cure under the general maritime law. This change in the law has been recognized by courts of this state. *See* ***Barry v. Plaquemine Towing Corporation,*** 96-0979 (La. App. 1st Cir. 8/4/97), 698 So.2d 1017, 1021-1022 (Fogg, J. dissenting), *writ denied,* 97-2579 (La. 1/9/98), 705 So.2d 1102; *Fairley v. Ocean Drilling and Exploration Company,* 95-1542 (La. App. 4th Cir. 2/19/97), 689 So.2d 736, 737; *Milstead v. Diamond M Offshore, Inc.,* 94-1582 (La. App. 3d Cir. 1995), 663 So.2d 137, 152, *reversed in part on other grounds,* 95-2446 (La. 7/2/96), 676 So.2d 89. Therefore, because this court must adjudge a case before it in accordance with the law existing at the time of our decision, we are required to reverse the trial court's judgment to the extent that it contains an award of punitive damages for the defendants' failure to pay Latiff maintenance and cure. *Crawford v. Falcon Drilling Company, Inc.,* 131 F.3d 1120, 1124-1125 (5th Cir. 1997); ***Segura v. Frank,*** 93-1271, 93-1401 (La. 1/14/94), 630 So.2d 714, 725, *cert. denied sub nom.,* ***Allstate Insurance Company v. Louisiana Insurance Guaranty Association,*** 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). However, we note that the $90,000.00 award made by the trial court consisted of punitive damages ***and*** attorney fees. The ***Guevara*** court specifically stated that attorney fees

are still recoverable in maintenance and cure cases as long as the proper showing of egregious fault is made. ***Guevara v. Maritime Overseas Corporation,*** 59 F.3d at 1513. Therefore, we review the instant case to determine if the trial court correctly determined that an award of attorney fees was merited.

DUTY TO PAY MAINTENANCE AND CURE

When a seaman becomes ill or injured in the service of his ship, the ship owner must pay him maintenance and cure regardless of whether the ship owner was at fault or whether the ship was unseaworthy. ***Guevara,*** 59 F.3d at 1499. This obligation includes paying a subsistence allowance, reimbursing medical expenses actually incurred, and taking all reasonable steps to ensure that the seaman receives proper care and treatment. Maintenance and cure are designed to provide a seaman with food and lodging when he becomes sick or injured; it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches "maximum medical recovery." ***Jordan v. Intercontinental Bulktank Corporation,*** 621 So.2d 1141, 1153 (La. App. 1st Cir.), *writs denied,* 623 So.2d 1335, 1336 (La. 1993), *cert. denied sub nom.,* ***Intercontinental Bulktank Corporation v. Jordan,*** 510 U.S. 1094, 114 S.Ct. 926, 127 L.Ed.2d 219 (1994).

Upon receiving a claim for maintenance and cure, the ship owner need not immediately commence payments; he is entitled to investigate and require corroboration of the claim. If, after investigating, the ship owner reasonably rejects the claim, and it is later determined that

maintenance and cure was in fact owed, the ship owner may be held liable only for the amount of maintenance and cure. If the ship owner has refused to pay without a reasonable defense, he becomes additionally liable for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for attorney fees as well. ***Morales v. Garijak, Inc.***, 829 F.2d 1355, 1358 (5th Cir. 1987).

The defendants argue that the trial court erred in awarding attorney fees to Latiff for their failure to pay maintenance because they did not owe him maintenance in the first instance. The defendants claim that they were not liable for maintenance because, after his return to Guyana, Latiff incurred no expenses for his support. The defendants correctly point out that maintenance is limited to seamen who actually incur expenses for their support and that no maintenance is owed when maintenance is provided by family members. *See* ***Springborn v. American Commercial Barge Lines, Inc.***, 767 F.2d 89, 95 (5th Cir. 1985). At trial, Latiff admitted that, after his accident, he returned to Guyana and lived with his brothers and sisters, without paying rent. However, he specifically stated that he paid for his own clothes and meals until his bank account closed, approximately one year before the trial. This constitutes sufficient evidence that Latiff provided his own support, in part, until he no longer had the means and that he was entitled to

maintenance. The defendants' argument to the contrary is without merit.[7]

The trial court determined that the defendants' failure to provide Latiff with proper medical treatment resulted in the exacerbation of an injury which would have quickly healed had proper treatment been provided. In reasons for judgment, the trial court noted that the defendants were aware that Latiff had been instructed by the physician at the Marine Medical Unit to have his injury checked again one month after his second visit to the clinic. Rather than providing the recommended medical attention, the defendants terminated Latiff's employment. A few weeks later, Latiff sent the defendants a letter and copies of medical reports, stating that he was still unable to work and requesting medical treatment. The defendants failed to respond, and in their appellate brief to this court, deny receiving the letter. The trial court noted "the only investigation made into the nature and extent of [Latiff's] condition was defendants' [counsel's] review of the medical reports from Marine Medical in New Orleans after the law suit was filed."

The trial court determined that the defendants unreasonably failed to pay Latiff maintenance and cure and that this failure was "intentional, arbitrary, capricious,

---

[7] The defendants also argue that Latiff was not entitled to maintenance and cure because he had reached maximum medical recovery when he left the boat in July of 1993. The record contains substantial medical and lay evidence demonstrating Latiff continued to have problems with his injury long after leaving the M/V MINI LYMPH. Clearly, he had not reached maximum medical recovery by late July of 1993.

and callous[.]" This is a factual determination which this court will not overturn absent manifest error. It is undisputed that the defendants had notice of Latiff's injury and of his need for continuing maintenance and medical care, but took no action to investigate the validity of his claim. Because there is a reasonable factual basis in the record to support the trial court's finding, and because this finding is not manifestly erroneous, we affirm the trial court's determination that the defendants are liable for attorney fees for failure to pay Latiff maintenance and cure.

Appellate courts have the authority to remand a case for an evidentiary hearing on the issue of attorney fees, where the record is not sufficient to justify the fee awarded, but all available evidence to justify the fee has not been placed in the record. ***Community Bank of Lafourche v. Motel Management Corporation of Louisiana, Inc.,*** 558 So.2d 641, 645 (La. App. 1st Cir. 1990). However, when the record contains sufficient evidence from which we can determine a reasonable attorney fee, or when the services are apparent from the record, this court may, in the interest of justice, fix an attorney fee award, eliminating the need for a remand. *See* ***Southern Siding Company, Inc. v. Raymond,*** 96-2168 (La. App. 1st Cir. 9/19/97), 703 So.2d 44, 49, *writ denied,* 97-3206 (La. 2/20/98), 709 So.2d 782; ***Nelson v. Allstate Insurance Company,*** 464 So.2d 1015, 1021 (La. App. 1st Cir. 1985). After considering the record in this matter and the factors set forth in Rule 1.5 of the Rules of Professional Conduct of the Louisiana State Bar Association, we determine that an attorney fee award in the amount of $12,576.00 is a reasonable amount to award to Latiff for the defendants'

egregious failure to pay him maintenance and cure. The attorney fee award constitutes 40% of the total amount awarded by the trial court for past medical expenses, past maintenance, future medical expenses, and two-thirds of the total amount awarded for past pain and suffering[8] ($4,558.23 + $4,281.93 + $12,600.00 + $10,000.00) = $31,440.16 x 40% = $12,576.00. Judgment will be rendered accordingly.

GENERAL DAMAGES

In his answer to the defendants' appeal, Latiff contends that the trial court erred in failing to award him sufficient damages for pain and suffering he has endured and will endure as a result of his injury.[9] The trial court awarded him $15,000.00 for past pain and suffering and made no award for future pain and suffering.

The trier of fact has much discretion in the assessment of damages. La. C.C. art. 2324.1. The role of the appellate court in reviewing general damage awards is

---

[8] The trial court determined that "[b]ecause of the failure of the [defendants] to provide medical treatment, a simple fracture turned into a far more debilitating injury resulting in over [two] and a half years of medical treatment, pain and suffering and unemployability for plaintiff." Based on this finding, we conclude that two-thirds of the past pain and suffering award is a reasonable amount to include in the base calculation for the award of attorney fees for the defendants' unreasonable failure to pay Latiff maintenance and cure.

[9] In his answer to the appeal, Latiff also requested an increase in special damages. However, this issue was not briefed on appeal and is, therefore, considered abandoned. Rule 2-12.4, Uniform Rules – Courts of Appeal.

not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. ***Brumfield v. Guilmino,*** 93-0366 (La. App. 1st Cir. 3/11/94), 633 So.2d 903, 907, *writ denied,* 94-0806 (La. 5/6/94), 637 So.2d 1056. The discretion vested in the trier of fact is great, and even vast, so that an appellant court should rarely disturb an award of general damages. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. ***Youn v. Maritime Overseas Corporation,*** 623 So.2d 1257, 1261 (La. 1993), *cert. denied sub nom.* ***Maritime Overseas Corporation v. Youn,*** 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

We find no abuse of the trial court's discretion in this case. Regarding Latiff's past pain and suffering, the trial court awarded him $15,000.00. After hearing all of the evidence regarding the extent and duration of Latiff's injury, the trial court concluded that this amount would fairly compensate Latiff for his past mental and physical pain, inconvenience, and other losses which detrimentally affected his lifestyle. We conclude that $15,000.00 is not lower than the amount that a reasonable trier of fact could asses for Latiff's particular injury and under these circumstances.

Regarding future pain and suffering, Latiff argues that the trial court erred by awarding him damages for future medical expenses without also awarding him damages for future pain and suffering. He argues "for a fact finder to award future medical expenses and to award

nothing for future pain and suffering . . . is contrary to the result a reasonable man should have reached because there will almost certainly be future pain associated with future physical therapy." Again, we find no abuse of the trial court's discretion in refusing to award Latiff damages for future pain and suffering therapy. The trial court heard the testimony at trial regarding Latiff's need for future physical therapy. It was within the trial court's discretion to determine that an award for any possible pain and suffering associated with the future physical therapy was not merited.

Accordingly, we decline to disturb the trial court's award of general damages in this case.

DECREE

For the foregoing reasons, the trial court's judgment is **AFFIRMED IN PART, REVERSED IN PART,** and **RENDERED.** The trial court's judgment is **REVERSED** insofar as it awarded Latiff $90,000.00 in punitive damages and attorney fees. An award of attorney fees is hereby **RENDERED** in favor of Latiff in the amount of $12,576.00. In all other respects, the trial court's judgment is **AFFIRMED.** Costs of the appeal are assessed to Elmini Lymph, Inc., Ceres Hellenic Shipping Enterprises, Ltd., and The United Kingdom Mutual Steamship Assurance Association (Bermuda), Ltd.

DAVID LATIFF

VS. NO. 54,712

ELMINI LYMPH, INC., CERES HELLENIC ENTERPRISES, LTD., & THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.

23RD JUDICIAL DISTRICT COURT

PARISH OF ASCENSION

STATE OF LOUISIANA

JUDGMENT

(Filed Apr. 3, 1997)

This matter proceeded to trial on February 1 and 2, 1996, and Reasons for Judgment were entered on January 29, 1997. In accordance with the Reasons for Judgment, the law and evidence being in favor thereof:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of plaintiff David Latiff and against Defendants Elmini Lymph, Inc., Ceres Hellenic Enterprises, Ltd., and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. in the following amounts:

$4,558.23	Past Medical Expenses
$4,281.93	Past Maintenance
$12,600.00	Future Medical Expense
$12,552.00	Past Loss of Wages
$2,354.00	Future Loss of Wages
$15,000.00	Past Pain and Suffering

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be and is rendered herein in favor of Plaintiff David Latiff and against defendants

Elmini Lymph, Inc., Ceres Hellenic Enterprises, Ltd., and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd., in the amount of $90,000.00 as punitive damages and attorney's fees for Defendants' intentional, arbitrary, capricious and callous conduct in failing to provide maintenance and care unto Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pre-judgment interest is awarded on all past losses (past medical expenses, past maintenance, past loss of wages, and past pain and suffering) from date of judicial demand and legal interest is awarded on future loss of wages and the punitive damage and attorney's fees award from January 29, 1997.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff David Latiff is further awarded all costs of this proceeding.

Signed this 3rd day of April, 1997, at GONZALES, Louisiana.

/s/ Alvin Turner, Jr.
JUDGE, 23RD JUDICIAL
DISTRICT COURT

A TRUE COPY

/s/ Illegible
Deputy Clerk & Recorder
ASCENSION PARISH April 3 1997

DAVID LATIFF	23RD JUDICIAL DISTRICT COURT
VERSUS NO. 54,712	
ELMINI LYMPH, INC., CERES HELLENIC ENTERPRISES, LTD., AND THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.	STATE OF LOUISIANA
	PARISH OF ASCENSION
FILED: _____	_____
	CLERK OF COURT

****

REASON FOR JUDGMENT

I. BACKGROUND

A. Introduction:

This matter came before the Court for trial on February 1 and 2, 1996, pursuant to a petition for damages filed by David Latiff (hereinafter called "plaintiff") and against Elmini Lymph, Inc., Ceres Hellenic Enterprises, Ltd., and The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. (hereinafter called "defendant"). The parties requested the Court not to render an opinion until each was given the opportunity to file post-trial briefs.

B. The Parties and their Contentions:

Plaintiff contends he was injured on June 18, 1993, while he was serving as an oiler aboard the M/V Mini Lymph. Plaintiff, a citizen of Guyana, alleges that at approximately 10:30 a.m. while the M/V Mini Lymph was docked in New Orleans, Louisiana, he was ordered

to clean the piston skirts on one of the vessel's pistons. Plaintiff further contends that while he was cleaning the piston, it came loose from the chain block and fell, causing the shaft to strike his left toe and rolling over his ankle and foot.

The defendants deny the occurrence of the accident. There was conflicting testimony as to if and how the accident occurred.

II. FACTS:

On June 18, 1993, plaintiff, while performing his duties as an oiler aboard the M/V Mini Lymph, was injured when a piston fell striking his left toe and rolling over his ankle and foot.

Plaintiff was taken to the Marine Medical Unit in New Orleans, Louisiana, immediately after the accident. The "Patient Complaint" section of the medical report notes that "piston fell left foot (illegible word) c/o pain left great toe." Plaintiff was taken to Marine Medical Unit again on June 25, 1993, and the report shows that Mr. Latiff exhibited increased pain and swelling of the foot and states that plaintiff was unfit for duty for at least one month. On this date, plaintiff was given crutches to use and told to stay off his foot and to see the doctor again in one month. However, the M/V Mini Lymph sailed from New Orleans on or about July 4, 1993, and arrived at a port in Suriname on approximately July 25, 1993, the date that plaintiff was supposed to see a doctor again. Instead of the shipowner making a medical appointment, plaintiff was discharged although his contract of employment provided for several months of additional employment.

In response to discovery propounded by the plaintiff, defendants admit that they made no arrangements of any kind to provide plaintiff with medical care that had been ordered by the physicians in New Orleans on June 25, 1993. Additionally, the only investigation made into the nature and extent of plaintiff's condition was defendants' counsel review of the medical reports from Marine Medical in New Orleans after the lawsuit was filed.

Upon plaintiffs arrival at home in Guyana, he went to the New Amsterdam Hospital on July 29, 1993, to seek medical attention and was seen by Dr. Placheco, the only orthopedic physician on staff. Dr. Placheco examined plaintiff and x-rayed his foot and ankle and placed plaintiff's leg in a plaster cast. This cast was removed in three to four weeks, at which time his ankle was x-rayed again and a second cast was placed on plaintiff's leg. The x-ray report of September 9, 1993, taken in Guyana states that " . . . a recent x-ray shows a line fracture in the astragalus talus bone with sclerosis. This is due because the foot was not immobilized in time and this was a sign of non union."

On August 11, 1993, plaintiff sent River Gulf Agency, Inc., the shipowner's agent, a letter regarding his medical condition and needs, including copies of the medical reports. In the August 11, 1993, letter plaintiff stated he was still unable to work and required medical treatment. No response was forthcoming from the defendant. Additionally, the defendants did not offer to provide any medical attention after the filing of the suit in December of 1994 nor after the deposition of Dr. Perez in Guyana on March 16, 1995.

In November of 1993, plaintiff's medical care was taken over by Dr. Perez who replaced Dr. Placheco. Dr. Perez testified by deposition that in November of 1993, plaintiff's ankle was still swollen and that he had a loss of motion or function of the ankle as well as continuing pain. This treatment continued on a month to month basis, including periodic injections of cortisone and lidocaine into the ankle joint through March of 1995. Dr. Perez also testified that he recommended ankle fusion surgery to eliminate the chronic pain which plaintiff had been suffering. Dr. Perez further testified that plaintiff's medical problems were the direct result of the injuries which resulted from the accident in which plaintiff was involved on June 18, 1993.

The defendants caused an independent medical examination to be performed on plaintiff on December 1, 1995. Dr. Landry noticed a limp, but found no evidence of a fracture on an x-ray, but did find demineralization of the left leg and ankle which is something that he said was "fairly typical" when a person has been in a cast for a period of time or who suffered from malnutrition. Dr. Landry, who testified by deposition, stated that he did not think Dr. Perez was competent and he would not let him "treat his dog".

On December 11, 1995, plaintiff contacted Dr. Alonzo Diodene who was of the opinion that plaintiff had suffered a fracture somewhere in the ankle region, showed evidence of atrophy of the calf, osteopenia of the ankle, and a tight heel cord. Dr. Diodene continued to treat plaintiff up to the time of the trial, at which time he testified that plaintiff continued to suffer from tightness in his heel cord, tenderness to palpation over the Achilles

Tendon, a diminished mineralization of the ankle bone, and a half inch measurable atrophy. Dr. Diodene had initially recommended physical therapy which was undertaken by plaintiff. At the time of the trial, Dr. Diodene's medical opinion was that it would be a minimum of four to six months before plaintiff could return to work as a seaman, after completing additional physical therapy.

III. LIABILITY:

Both plaintiff and defendants agree that United States' law governs this controversy. The Jones Act allows the seaman to recover in negligence from the employer for damages sustained. The employer need not be the owner of the vessel. *Volyrakis v. M/V Usabelle,* 668 F.2d 863 (5th Cir. 1982).

A Jones Act employer owes a high duty of care to its employee and the plaintiff need establish only a scintilla of evidence of negligence in order to recover. The seaman's burden is "featherweight." The seaman must establish some negligence, albeit slight. *Colburn v. Bunge Towing, Inc.,* 883 F.2d 372 (5th Cir. 1989).

The General Maritime Law provides for liability on the shipowner if the vessel is unseaworthy. The duty to provide a seaworthy vessel encompasses providing adequate equipment, *Michalic v. Cleveland Tankers, Inc.,* 364 U.S. 325 (1960); physical aspects of the vessel itself, *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539 (1960), the captain; the crew.

The seaman's duty of care to himself is slight. *Brown v. OMI Corp.*, 863 F.Supp. 169 (S.D.N.Y. 1994).

This Court was called upon to make a credibility determination because of the conflicting testimony. After carefully observing the witnesses in court and considering the evidence as a whole, this Court accepts he testimony of plaintiff. The Court does not find credible the testimony of Ioannis Xenakis, the ship's captain in June of 1993 nor Ramon Gonzales, the assistant port engineer for the M/V Mini Lymph. Indeed, the Mini Lymph's captain on duty on June 18, 1993, and June 25, 1993, testified that he did not give permission for and denies that plaintiff even went to the doctor in New Orleans. Both of the defendants' witnesses contended that no accident of any nature had occurred.

The documentary evidence is consistent with the occurrence of any injury as described by plaintiff and the medical testimony as a whole, including the documentation of the treatment, establishes that plaintiff did in fact sustain a fracture in the ankle region. Because of the failure of the defendant to provide medical treatment, a simple fracture turned into a far more debilitating injury resulting in over 2 and a half years of medical treatment, pain and suffering and unemployability for plaintiff.

This Court finds that the M/V Mini Lymph was unseaworthy as the time of the accident and that this unseaworthiness was the cause in fact of the accident. The piston fell from its chain block during normal use. This is a classic case of unseaworthiness where an article of the vessel's equipment fails under proper and expected use. Additionally, this Court finds that the defendant was

likewise negligent under the Jones Act for failing to provide plaintiff a reasonably safe place to work, the failure to provide adequate supervision, and to give any instruction as to basic safety matters. Plaintiff testified that the vessel owner never provided any training for plaintiff on board the M/V Mini Lymph and he never received any safety manuals or safety instructions of any sort, testimony that was not rebutted by the defendant.

IV. MAINTENANCE AND CURE:

A shipowner has an absolute non-delegable duty to properly investigate an accident and to provide maintenance and cure until a seaman reaches maximum medical cure. In the instant case, regardless of the cause of the injury, the evidence is undisputed that plaintiff was a seaman and suffered an injury in the course of his duties on June 18, 1993. The evidence is further undisputed that on his second visit to the physician in New Orleans that the defendants arranged, plaintiff was told to be checked again in thirty days or on July 25, 1993. Instead of providing the required medical attention of July 25, 1993, the defendants discharged plaintiff in Suriname, a neighboring country of the plaintiff's domicile.

Plaintiff sought the only orthopaedic care available and, if Dr. Landry's testimony is correct, namely that Dr. Perez is not competent and should not be allowed to "treat a dog", then it merely emphasizes the egregious maintenance and cure.

This Court accepts the testimony of plaintiff that he did everything possible to minimize his injury by seeking the only available health care in Guyana, and further

accepts the testimony of Dr. Diodene who examined plaintiff's ankle and leg in open court and demonstrated his disability at the time of the trial. This Court finds the defendant's conduct in failing to provide maintenance and cure to be intentional, arbitrary, capricious, and callous and awards punitive damages and attorney's fees in the amount of $90,000.00.

This Court further finds that the expenses incurred by plaintiff for medical attention, prescriptions, and physical therapy are likewise part of the maintenance and cure and awards $212.28 for prescription costs, $427.00 for Dr. John J. Watermeyer, $815.00 for MRI at Louisiana Clinic, $476.95 for a triple bone scan at Digital Diagnostic Center, $1,472.05 for the Rehabilitation Hospital of Baton Rouge for physical therapy, $780.00 for the Baton Rouge General, and $345.00 for Dr. A.N. Diodene, for a total of $4,558.28 for past medical expenses. In addition, plaintiff lodging and food expenses during the time he was here in the United States obtaining medical treatment in the amount of $4,281.93 are likewise awarded to plaintiff for a total award for past due maintenance and cure of $8,840.21. Also, this Court awards $12,600.00 for future physical therapy, the period of time that Dr. Diodene testified therapy would be needed for plaintiff to reach maximum medical cure.

Plaintiff's injury on June 18, 1993, should have resolved itself quickly and in a satisfactory manner. However, the defendant's arbitrary conduct resulted in nearly a three year period of time in which the plaintiff was incapacitated and endured pain on a daily basis simply because they did not provide the requisite medical attention.

IV. DAMAGES

This Court accepts the testimony of Dr. Rice as far as lost past and lost future wages, and will enter judgment as follows:

Past Loss Wages	$12,552.00
Future Loss Wages	$2,354.00
Past Pain and Suffering	$15,000.00
Future Pain and Suffering	$ -0-

Pre-judgment interest is awarded on past losses from date of judicial demand. Plaintiff is awarded interest from date of judgment on all future economic damages.

Counsel for plaintiff shall prepare judgment consistent with the reasons stated herein.

Gonzales, Louisiana, this 29th day of January, 1997.

/s/ Alvin Turner, Jr.
Honorable Alvin Turner, Jr.
Judge, 23rd Judicial District Court
Division "E"

The Supreme Court of the State of Louisiana

DAVID LATIFF

VS. NO. 98-C - 2686

ELMINI LYMPH, INC.,
CERES HELLENIC ENTERPRISES, LTD.,
AND THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD.

IN RE: Latiff, David; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA 97 1819; Parish of Ascension 23rd Judicial District Court Div. "E" Number 54,712

December 18, 1998

Denied.

WFM

JPV

CDT

JTK

CALOGERO, C.J. would grant the writ.

KIMBALL, J. would grant the writ.

JOHNSON, J. not on panel.

Supreme Court of Louisiana
December 18, 1998

/s/ John Tarlton Olivier
Clerk of Court
For the Court

Article III, Section 2, Clause 1 of the United States Constitution provides:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a state and Citizens of another state; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. §1333, commonly known as the "saving to suitors" clause, provides in pertinent part as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> > (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

46 U.S.C. §688, commonly known as the Jones Act, provides in pertinent part as follows:

> (a) Application of railway employee statutes; jurisdiction
>
> > Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury,

and in such action all statues of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statues of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.